BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ANDREW WESTON	)	
Claimant	)	
VS.	)	
	)	Docket No. 231,589
AMERICAN LINEN SUPPLY COMPANY	)	
Respondent	)	
AND	)	
	)	
CONTINENTAL CASUALTY	)	
INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appealed the February 28, 2002 Preliminary Order entered by Assistant Director Kenneth J. Hursh.

ISSUES

This is a claim for a June 27 or 28, 1996 accident and resulting head injury. In the February 28, 2002 Order, the Assistant Director denied claimant's request for benefits after finding that claimant had failed to serve timely written claim upon respondent.

Claimant contends Assistant Director Hursh erred. Claimant argues that he was mentally incapacitated following the accident and, thus, the written claim that was served on respondent on January 5, 1998, was timely. Accordingly, claimant requests the Board to reverse the Assistant Director's finding that claimant failed to provide respondent with timely written claim.

Conversely, respondent and its insurance carrier contend claimant failed to prove that he was mentally incapacitated during the period that he was required to provide written claim and, therefore, the Assistant Director's Order should be affirmed.

The only issue before the Board on this appeal is whether claimant served timely written claim upon respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the Board finds and concludes:

1. Claimant was injured on June 27 or 28, 1996, while driving a delivery truck for respondent. The accident arose out of and in the course of claimant's employment with respondent. At the time of the accident, claimant was 30 years old.

2. Following the accident, respondent and its insurance carrier provided claimant with both medical benefits and temporary total disability benefits. By letter dated August 28, 1996, respondent's insurance carrier notified claimant that it was changing claimant's treating physician to Dr. James Wilson of Coffeyville, Kansas, and that claimant had an appointment with Dr. Wilson on September 3, 1996.

3. By letter dated September 5, 1996, respondent's insurance carrier notified claimant that Dr. Wilson had released claimant to light duty work and that claimant's temporary total disability benefits were being terminated effective September 4, 1996. The letter also advised claimant his next visit with Dr. Wilson was scheduled for October 3, 1996.

4. By letter dated October 14, 1996, respondent's insurance carrier advised claimant that he had missed his follow-up visit with Dr. Wilson and that the claims examiner would assume claimant was well and would close the file if claimant did not return to the authorized physician within 30 days or otherwise advise that he needed additional treatment. The record is not entirely clear, but it appears claimant did not return to Dr. Wilson and did not otherwise respond to the claims examiner's letter.

5. In their brief filed with the Board, respondent and its insurance carrier concede they did not file an accident report with the Division of Workers Compensation regarding claimant's June 1996 accident. They also concede that December 13, 1996, was the last date that they furnished any type of compensation to claimant. The parties agreed that on January 5, 1998, claimant served respondent with a written claim for workers compensation benefits.

6. The Workers Compensation Act requires an injured worker to serve written claim upon his or her employer within 200 days of the accident or within 200 days of the last date that compensation is provided, whichever is later. The Act also provides that the 200-day period is extended to one year when the employer fails to file an accident report with the Division of Workers Compensation.[1]

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[1] See K.S.A. 44-557 (Furse 1993) and *Childress v. Childress Painting Co.*, 226 Kan. 251, 597 P.2d 637 (1979).

7. But the Workers Compensation Act also provides that its time limitations do not apply as long as an incapacitated person or a minor has no guardian or conservator. K.S.A. 44-509 (Furse 1993) reads:

> (a) In case an injured workman is an incapacitated person or a minor, or when death results from an injury in case any of his dependents, as herein defined, is an incapacitated person "or a minor" at the time when any right, privilege, or election accrues to him under the workmen's compensation act, his guardian or conservator may on his behalf, claim and exercise such right, privilege, or election, and no limitation of time, in the workmen's compensation act provided for, shall run, so long as such incapacitated person or minor has no guardian or conservator.

8. The Act does not define incapacitated but K.S.A. 1996 Supp. 77-201, which addresses the rules of statutory construction, states that an incapacitated person is a disabled person as defined in K.S.A. 59-3002, as amended. K.S.A. 1996 Supp. 59-3002 defines a disabled person as an adult whose ability to receive and evaluate information effectively, or communicate decisions, is impaired to such an extent that the person lacks the capacity to manage his or her financial affairs or to meet the essential requirements for physical health or safety. The statute reads, in part:

> (a) "Disabled person" means any adult person whose ability to receive and evaluate information effectively or to communicate decisions, or both, is impaired to such an extent that the person lacks the capacity to manage such person's financial resources or, except for reason of indigency [sic], to meet essential requirements for such person's physical health or safety, or both. A person shall not be considered to be disabled or to lack capacity to meet the essential requirements for physical health or safety for the sole reason such person relies upon or is being furnished treatment by spiritual means through prayer, in lieu of medical treatment, in accordance with the tenets and practices of a recognized church or religious denomination of which such person is a member or adherent.

9. Claimant's family physician Dr. J. I. Graham, who provided some treatment to claimant following the June 1996 accident and who also admits to being a family friend and a deacon in claimant's father's church, wrote claimant's attorney on April 9, 1998, advising that claimant was disabled following the June 1996 accident as he was unable to receive and evaluate information effectively or even communicate his decisions. The doctor wrote, in part:

> . . .
>
> As well as being the Weston's family physician, I am a personal friend of Andrew Weston and his father George Weston, Minister of Fairfax's Christian Church. I

> have been able to follow Andrew on a friend-to-friend basis, rather than strictly in a patient-doctor relationship. He has subsequently had a great deal of difficulties.
>
> I took the liberty in 1997 to refer Andrew to Dr. Kent R. Smalley, a Stillwater neurologist, to help us control what appeared to be an increased amount of seizure activity that was not being controlled by Depakote and valproic acid. As you can [see] on the records, the patient sustained a significant amount of traumatic brain injury with significant neuropsychological sequelae and seizure disorder. Being a personal friend of this patient, **I have myself noticed a significant memory loss** and multiple seizures, for which Andrew has had to be changed to other medications.
>
> In light of the above history and physical findings, I don't doubt that these contribute to making Andrew's ability to process information, make decisions, concentrate and otherwise tend to his personal affairs, almost impossible. The patient lives with his parents and they now tend to most of his personal affairs.
>
> It is definitely my medical opinion that Mr. Andrew Weston certainly meets the definition of a disabled person. **He is not able to receive and evaluate information effectively or even communicate decisions.** Again, he exhibits a great deal of memory loss and a significant change of personality and his seizure activity has increased despite rigorous control as prescribed by a neurologist. . . . (Emphasis added.)

At his deposition in January 1999, Dr. Graham testified that he believed claimant was disabled as defined above for most of the time following the June 1996 accident.

10. Claimant's attorney wrote Dr. Smalley, who began treating claimant in November 1997, and asked the doctor if he believed claimant was disabled as defined by Kansas law. The doctor responded in an April 10, 1998 letter that claimant was disabled as he was unable to care for himself, communicate decisions, manage his personal resources, and care for himself in a safe manner. The doctor wrote, in part:

> . . .
>
> Mr. Weston has been under my care now for the past several months. He has been diagnosed with traumatic brain injury and epilepsy both as a result of his accident. Mr. Weston's accident has left him disabled in my view point [sic]. He certainly cannot perform every day [sic] activities without assistance, and he is not able to return to work at even a basic job because of his brain injury and seizures. He has suffered from some noncompliance with his medications, but this is mainly due to his misunderstanding of instructions, memory problems or concreteness. Mr. Weston will require treatment for his disabilities for the rest of his life and I do not

> believe he will see significant improvement in his cognitive abilities. I do think we may be able to gain good control over his epilepsy.
>
> To answer some of your questions more specifically, **Mr. Weston cannot process information, make decisions, concentrate or attend to tasks or attend to his personal affairs in a normal manner.** I am certain that this has been the case since the accident, and I am certain at the time he was being represented in Kansas that his cognitive abilities were so impaired that his decision making skills were extremely poor and he could have easily been manipulated into releasing his claims. I also think it is very probable, because of his forgetfulness, his concreteness and his poor motivation, that he would not go through with anything that appeared complicated to him and certainly it is a possibility that he would not even understand the process.
>
> Certainly, I believe Mr. Weston meets the definition of a disabled person, and I think **since the patient has been under my care, he has obviously demonstrated his inability to care for himself, communicate decisions, manage his personal resources, and care for himself in a safe manner.** (Emphasis added.)

Dr. Smalley was also deposed in January 1999 and described how claimant dropped by the doctor's office on numerous occasions in a confused state. The doctor also described how claimant was unable to remember instructions and how he was unable to follow directions unless they were extremely specific. According to Dr. Smalley, claimant has met the definition of being disabled since he first saw claimant in November 1997 through the date the doctor last saw claimant in October 1998.

11. While treating claimant, Dr. Smalley referred him to Dr. Philip R. Whatley for a neuropsychological evaluation. Dr. Whatley evaluated claimant in December 1997 and concluded that claimant had dementia due to a head trauma. According to the doctor's records, claimant demonstrated "significant signs of frontal lobe dysfunction, severe attention and concentration difficulties, and complex verbal memory deficits." The doctor also found that claimant met the diagnostic criteria for mood disorder due to a generalized medical condition. Dr. Whatley recommended cognitive rehabilitation and individual psychotherapy, along with psychopharmacological treatment. But the doctor noted that he did not conduct a comprehensive neuropsychological evaluation.

12. Following a hearing in 1998, Administrative Law Judge Nelsonna Potts Barnes ordered a neuropsychologist, Dr. Mitchel A. Woltersdorf, to evaluate claimant for purposes of determining whether claimant was incapacitated following the June 1996 accident. The doctor saw claimant in July 1998 and, after administering a battery of tests, determined that claimant had sustained a mild traumatic brain injury from which he had recovered. It is Dr. Woltersdorf's opinion that claimant was not disabled as defined above.

13. Claimant testified that following the accident he has had problems remembering, becoming confused and controlling his emotions. He has also experienced increased seizure activity and in the fall of 1996 moved in with his parents. In May 1998, claimant's father obtained an order from the District Court in Osage County, Oklahoma, naming him claimant's conservator. In that order, the Court determined that claimant was a disabled person as he was unable to manage his property. When claimant testified in February 1999, he was working for his father's church earning $300 per month. Claimant also testified that following the accident he had worked an unspecified period of time for NOICO in Ponca City, Oklahoma, and for a Ponca City nursing home. Claimant's father also testified at the February 1999 hearing and substantiated claimant's testimony about difficulties with his memory, his mood changes, his inability to handle his finances and his lapses in concentration. Furthermore, claimant's mother testified at the hearing and stated, among other things, that she did not believe claimant has been able to handle his affairs since the accident.

14. Based upon the record compiled to date, the Board is persuaded by Dr. Smalley's testimony that claimant was disabled as defined by Kansas law as early as November 1997 when Dr. Smalley first saw claimant. The doctor saw claimant numerous times over the next several months and was in a position to assess claimant's abilities to function on a day-to-day basis. The doctor observed the effects of claimant's head injury and how it impacted his memory and ability to cope with common tasks. As Dr. Smalley indicated, claimant required tremendous direction and had to be continually reminded to do things. The Board concludes Dr. Smalley's testimony provides the best evidence of claimant's condition during the critical period in question.

15. As claimant was mentally incapacitated as contemplated by the Workers Compensation Act following the June 1996 accident, the written claim served upon respondent on January 5, 1998, was timely. Accordingly, the Preliminary Order finding that claimant failed to serve timely written claim upon respondent should be reversed.

16. As provided by the Act, all preliminary hearing findings are subject to modification upon a full hearing on the claim.[2]

17. For future reference, the parties are reminded that only those medical records that are material to the issues need to be entered into the record.

WHEREFORE, the Board reverses the Preliminary Order finding that claimant failed to serve timely written claim upon respondent. The case is remanded to the Administrative

[2] K.S.A. 1996 Supp. 44-534a.

Law Judge and/or the Assistant Director to address any remaining issues regarding claimant's request for preliminary hearing benefits.

IT IS SO ORDERED.

Dated this ____ day of May 2002.

BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Gary K. Albin, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Kenneth J. Hursh, Assistant Director
Philip S. Harness, Workers Compensation Director